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ABSTRACT

Tilton versus Richardson, the Connecticut Colleges' case, was the first explicit test of the constitutional propriety of federal grants to church related colleges and universities. Specifically the case involved the constitutionality of granting federal funds under the Higher Education Facilities Act to 4 church related colleges in Connecticut. This report presents an interpretation of the June 28, 1971 Supreme Court decision that went 5 to 4 in favor of the colleges. Included are a summary of the legal history that constitutes the background for the June 28 decision, a critical analysis of the decision itself, and an examination of the implications for church related colleges. (AF)

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TILTON V. RICHARDSON

The Search for Sectarianism in Education

Charles H. Wilson, Jr

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Association of American Colleges

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TILTON V. *RICHARDSON*

THE SEARCH FOR SECTARIANISM IN EDUCATION

Charles H. Wilson, Jr

ASSOCIATION OF AMERICAN COLLEGES
Washington, D.C.

1971

PREFACE

Tilton v. *Richardson* — the Connecticut colleges case — is the first explicit test of the constitutional propriety of federal grants to church-related colleges and universities. As such it is clearly of capital significance for members of the Association of American Colleges. In June 1970, therefore, when the Supreme Court of the United States agreed to entertain an appeal from the decision of the district court in favor of the four colleges, the Board of Directors of the Association decided to submit to the Supreme Court an *amicus curiae* brief in support of the colleges and to seek the cooperation of other national organizations in this action. We were in fact joined in submission of the brief by the American Council on Education, the Association of American Universities, the Council for the Advancement of Small Colleges and the National Association of State Universities and Land-Grant Colleges.

In the spring of this year, when the case had been argued before the Supreme Court and a decision seemed imminent, the Commission on Religion in Higher Education recalled that, five years earlier, the Maryland Colleges case *(Horace Mann League* v. *Board of Public Works)* had led a number of church-related colleges to take hurried and perhaps unnecessary action to exonerate themselves from the charge of being "legally sectarian." In order to obviate a repetition of such precipitate action, if the decision of the Supreme Court were not unequivocally favorable to the colleges, the commission recommended to the Board of Directors that, as soon as the decision was rendered, members should be informed that at the earliest possible moment they would be furnished with a professional interpretation of the Court's decision. The Board accepted this recommendation and its intention was announced to the membership in a circular letter dated 28 June 1971.

For the task of preparing an interpretation we were fortunate in obtaining the services of Charles H. Wilson, Jr who, as a member of the firm of Williams, Connolly and Califano, attorneys for the four colleges, was principally responsible for the legal research entailed in drawing up their briefs at every stage of the case. The text that we are now publishing is not in any meaningful sense of the words a statement of the Association of American Colleges. It is, as it was intended to be, a professional interpretation of the Supreme Court's decision by an experienced lawyer with intimate knowledge of the case and profound understanding of its

implications. It includes a succinct and lucid summary of the legal history that constitutes the background of the decisions of 28 June 1971, as well as a critical analysis of the decisions themselves. Every word of Mr Wilson's brilliant exposition should be read with careful attention by those responsible for the welfare of church-related colleges, but I would particularly commend to their earnest consideration the practical advice the author offers in the chapter on "Implications of the June 28 Decisions."

The Association owes a deep debt of gratitude to Mr Wilson. We are also indebted to the Mary Reynolds Babcock Foundation, the Association of Jesuit Colleges and Universities, the Board of College Education of the American Lutheran Church, the Board of College Education and Church Vocations of the Lutheran Church in America, the Board of Higher Education of the United Methodist Church, the Board of Higher Education of the United Presbyterian Church in the U.S.A., the Council of Protestant Colleges and Universities, the Division of Christian Education of the Presbyterian Church, U.S., and the National Catholic Educational Association, which shared with AAC the cost of preparing, printing and distributing this interpretation. The thanks of the Association are, no doubt, of less value to our friends and benefactors than the satisfaction of contributing to the solution — still, alas, incomplete — of a problem of crucial importance to American higher education.

FREDERIC W. NESS
President
Association of American Colleges

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I
INTRODUCTION

On June 28, 1971, in the companion cases of *Tilton* v. *Richardson* and *Lemon* v. *Kurtzman*, the United States Supreme Court spoke for the first time on the question of the constitutional eligibility of church-related educational institutions for direct public financial assistance. The *Tilton* and *Lemon* decisions disposed of three appeals challenging the constitutionality of one federal statute and two state statutes providing financial assistance in varying forms to, among others, schools with church or religious affiliations. Common to each case was the contention that the Establishment Clause of the First Amendment to the United States Constitution prohibited the allocation of public funds to religious or church-related educational institutions. In the *Tilton* case, the Supreme Court ruled that some church-related colleges and universities are constitutionally eligible for some forms of direct public aid. In the *Lemon* case, however, the Court imposed a constitutional bar to most significant educational aid programs that benefit church-controlled elementary and secondary schools.[1]

The importance of the Supreme Court's landmark decisions of June 28 for the future of church-related education in this country cannot be overstated. As the costs of providing high-quality education have accelerated at an increasingly rapid pace in the last decade, church-related institutions, along with other private schools, have looked to the federal and state governments for assistance in meeting their escalating financial burdens. The federal and state governments have responded with a variety of programs that have, to some degree, managed to hold down the costs to the ultimate educational consumer—the student and his parents who pay the bills. The important aspect of that development has been the willingness of government to extend its financial support beyond the public sector of education to private schools, including those with church relationships or religious affiliations.

The impact of the Supreme Court's June 28 decisions will be felt only by those educational institutions which have church or religious

[1]The *Lemon* decision disposed of two separate appeals—one from Pennsylvania involving that state's Nonpublic Elementary and Secondary Education Act, and one from Rhode Island involving that state's salary supplement program for nonpublic elementary school teachers. The background to those two separate appeals is discussed in Chapter II of this paper.

affiliations, for it is only the existence of those affiliations that gives rise to Establishment Clause issues in educational aid programs. Private schools without such affiliations are unaffected by the Supreme Court's rulings and can continue to participate in such programs. Thus, to the extent that the Supreme Court's decisions cause government to restrict or eliminate participation by church-related schools in educational aid programs, those schools will be cut off from an important source of financial assistance and their financial position will deteriorate vis-a-vis public and other private schools.

In this paper, I will analyze the effect of the Supreme Court's June 28 decisions on the continued eligibility of church-related colleges and universities for participation in aid programs for higher education. The *Tilton* decision is most relevant to that question since the Supreme Court in that case sustained the constitutionality of the Higher Education Facilities Act of 1963[2] and ruled that four Catholic colleges in Connecticut were constitutionally eligible to receive federal funds under that statute. However, the *Tilton* decision is only one thread in the total fabric of Establishment Clause doctrine woven by the Supreme Court in recent years, and the *Tilton* decision must be placed in the context of that total constitutional doctrine to be fully understood. Consequently, this paper will also review several of the Court's earlier Establishment Clause decisions and the several constitutional theories that were available to the Court when it decided the *Tilton* case.

It will also be necessary to examine at some length the decision in *Lemon* v. *Kurtzman*, which struck down statutes in Pennsylvania and Rhode Island providing significant sums of money to supplement the salaries of teachers in church-controlled elementary and secondary schools. The *Lemon* decision is of particular importance because the Court used that case as the vehicle for articulating the basic constitutional principles applicable to the question of public aid to church-related schools and then applied those principles in the *Tilton* decision. For that reason, the *Tilton* decision can be understood only against the background of the Supreme Court's reasoning in the *Lemon* case.

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[2] 20 U.S.C. §§ 701-58

II
BACKGROUND TO THE JUNE 28 DECISIONS

A. History of the *Tilton* and *Lemon* Cases

The Supreme Court's June 28 decisions grew out of three cases that followed separate but parallel paths through lower federal courts to the Nation's highest court. A brief summary of how those cases developed in and were decided by the lower federal courts will provide a factual context for the discussion of the constitutional principles that follows.

1. Tilton *v.* Richardson

The *Tilton* case was initiated in the United States District Court for the District of Connecticut on September 25, 1968, just three months after the Supreme Court had ruled for the first time that federal taxpayers have standing to challenge federal spending programs on the ground that they violate the Establishment Clause of the First Amendment. The suit was filed by fifteen individuals who claimed the common bond of being federal taxpayers. Their constitutional attack was limited to Title I of the Higher Education Facilities Act, which authorized the award of federal funds to public and private colleges and universities to finance, in part, the construction of undergraduate academic facilities. The plaintiffs alleged that, to the extent that Title I funds were awarded to "sectarian" colleges and universities, the statute contravened the Establishment Clause. Their complaint defined "sectarian" schools as "educational institutions at the college or university level organized for and engaged in the propagation and promotion of the doctrines, teachings and practices" of a particular religion.

The named defendants in the suit were the state and federal officials responsible for administering the Higher Education Facilities Act and four Catholic colleges and universities in Connecticut which had been the recipients of a total of five Title I grants. The defendant colleges and universities were Fairfield University, Sacred Heart University, Albertus Magnus College and Annhurst College. The Title I funds received by those schools totaled almost $2,000,000. The complaint alleged that each of the defendant schools was "an institution of higher learning organized, conducted and controlled" by the Roman

Catholic Church or a religious society of that church "in accordance with the dogma and doctrines of said church for the purposes of propagating and promoting the Roman Catholic faith."

Because the plaintiffs challenged the validity of an act of Congress on constitutional grounds, the case was assigned to a panel of three federal judges under the provisions of Section 2282 of Title 28 of the United States Code. Cases heard and decided by three-judge district courts under that section can be appealed directly to the United States Supreme Court without an intermediary appeal to the United States Court of Appeals.

The *Tilton* case presented momentous constitutional questions. It was the first time in this century, and only the second time in history,[3] that a court would be required to rule on the merits of an Establishment Clause challenge to an act of Congress. Yet the case went through the ordinary litigation processes that any civil suit encounters in the federal courts. The defendant colleges were required, under the Federal Rules of Civil Procedure, to produce for the plaintiffs hundreds of documents, including their catalogs, accreditation materials, student and faculty handbooks, fund-raising brochures, student and faculty application forms, student newspapers and financial statements. The plaintiffs took the depositions of the presidents of each of the defendant colleges. The parties entered into stipulations concerning certain issues of disputed fact. Finally, the questions of law and fact in the case were examined at length during five days of trial before the three-judge court.

The plaintiffs presented their case almost exclusively by placing in evidence more than 150 documents obtained from the defendant colleges and the state and federal governments. The defendant colleges presented their evidence principally through the testimony of 22 witnesses, who included the presidents of those schools and members of their faculties. At the conclusion of the evidence, the court heard almost a full day of legal arguments and took the case under advisement. Two months later, on March 19, 1970, the court issued its decision, ruling unanimously that the Higher Education Facilities Act was constitutional and that the contested Title I grants to the defendant colleges were constitutionally valid.[4] Within two months the plaintiffs had appealed that decision to the Supreme Court.

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[3]See *Bradfield* v. *Roberts*, 175 U.S. 291 (1899)

[4]The district court's decision in *Tilton* is reported at 312 F. Supp. 1191 (1970).

2. Lemon *v.* Kurtzman

The *Lemon* case was initiated in the United States District Court for the Eastern District of Pennsylvania six months after the *Tilton* case but reached the Supreme Court before *Tilton*. At issue in the *Lemon* case was the constitutionality of Pennsylvania's Nonpublic Elementary and Secondary Education Act, which reimbursed nonpublic schools for the cost of providing their students with a secular education in four designated subjects—mathematics, physical sciences, modern foreign languages and physical education. Nonpublic schools which qualified were reimbursed for the cost of teachers' salaries, textbooks and educational materials incurred in the teaching of those subjects. The statute prohibited reimbursement for any course that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The plaintiffs in the *Lemon* case were three state taxpayers and several Pennsylvania chapters of such national organizations as the American Civil Liberties Union, the American Jewish Congress, the National Association for the Advancement of Colored People, and Protestants and Other Americans United for Separation of Church and State. The defendants were the state officials responsible for administering the statute and several nonpublic schools that were eligible to receive funds under the statute. The defendant schools were affiliated with the Roman Catholic Church and several other denominations.

The plaintiffs made two constitutional attacks on the Pennsylvania statute. First, they alleged that the extension of state funds under the statute to "sectarian" schools contravened the Establishment Clause. Secondly, they alleged that the defendant schools were virtually all-white in their racial composition, that those schools discriminated in their admissions policies on religious and racial grounds and that, because those schools provided an alternative for white parents seeking to avoid the consequences of racial integration in the public schools, they contributed to the problem of de facto segregation. For those several reasons, the plaintiffs argued that providing public funds to such schools violated the Equal Protection Clause of the Fourteenth Amendment. Because a state statute was challenged on constitutional grounds, a three-judge court was convened.

The attorneys representing the defendants made an initial decision to seek resolution of the constitutional issues in the case without proceeding with the regular trial process. They, therefore, filed motions to dismiss the complaint with the court, asking the court to decide

the constitutionality of the challenged statute on its face. Under that procedure, the court was required to accept the allegations of the complaint as true and to determine whether, in light of those allegations, the statute conformed with constitutional limitations. By a 2 to 1 vote, the court ruled that the statute was constitutional. The court held that, under the Supreme Court's decisions, the statute did not violate the Establishment Clause. It did not reach the merits of the plaintiffs' Equal Protection Clause claim because it ruled that no plaintiff had standing to raise that issue.[5] The plaintiffs quickly appealed the decision to the Supreme Court and, on April 20, 1970, the Supreme Court agreed to hear and decide the appeal.

3. DiCenso *v.* Robinson

The third of the three appeals decided by the Supreme Court on June 28 grew out of the case of *DiCenso* v. *Robinson*, which originated in the United States District Court for the District of Rhode Island. The complaint was filed on December 15, 1969, two weeks after the district court decided the *Lemon* case and one week after the *Tilton* trial ended. The plaintiffs in *DiCenso* attacked on Establishment Clause grounds a Rhode Island statute providing fifteen per cent supplements to the salaries of teachers in nonpublic elementary schools in the state. The salary supplements were available only to teachers in nonpublic schools with per pupil costs for secular education that did not equal or exceed the per pupil cost of education in the public schools. To qualify for the salary supplement, a nonpublic school teacher was required to be certified by the State Department of Education, to teach only courses being taught in the public schools and to use only teaching materials in use in the public schools. The teacher was also prohibited from teaching a course in religion while receiving a salary supplement from the state. Unlike the Pennsylvania statute which authorized the payment of state funds directly to the nonpublic schools, the Rhode Island statute required that the salary supplements be paid directly to individual teachers.

The plaintiffs in the *DiCenso* case were six state taxpayers. The only named defendants were the state officials responsible for administering the salary supplement program. Two months after the complaint was filed, the district court allowed seven teachers eligible for salary supplements and two parents of children in Roman Catholic parochial schools to intervene on behalf of the defendants. Again, a three-judge court was convened to hear and decide the case.

[5]The district court's decision in *Lemon* is reported at 310 F. Supp. 35 (1969).

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As in the *Tilton* case, the issues in the *DiCenso* were explored through depositions taken in advance of trial and a regular trial before the three-judge court. The evidence focused on Roman Catholic parochial schools because only teachers in those schools had qualifed for salary supplement payments. The plaintiffs presented their evidence through several documents and the testimony of the Roman Catholic Diocesan Superintendent of Schools. The defendants' evidence consisted of the testimony of the administrator of the salary supplement program and of several teachers who were receiving salary supplements. Several weeks after the trial ended the court issued its decision, ruling unanimously that the salary supplement program violated the Establishment Clause.[6] The defendants appealed to the Supreme Court, and the *DiCenso* case was scheduled for argument with the *Tilton* and *Lemon* cases.

B. Prior Establishment Clause Decisions

The First Amendment to the Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The terse language of the two religion clauses provides scant guidance for their application to specific governmental actions. Chief Justice Burger conceded as much in his majority opinion in *Lemon* when he observed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment." That the Court would make such a statement in its most recent pronouncement on the Establishment Clause illustrates that the Establishment Clause remains an imprecise and uncertain restraint on governmental power.

Prior to its decisions in *Lemon* and *Tilton*, the Supreme Court had attempted to sketch in the contours of the Establishment Clause's limitations on governmental action in several leading decisions. Of those earlier decisions, the four summarized below had a decisive impact on the Court's decisions in *Tilton* and *Lemon*.

1. Everson *v.* Board of Education (1947)[7]

The *Everson* case contains the Supreme Court's first detailed exposition of the meaning and scope of the Establishment Clause. At issue in *Everson* was a New Jersey statute that authorized the use of

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[6]The district court's decision in *DiCenso* is reported at 316 F. Supp. 112 (1970).

[7]330 U.S. 1

public funds to reimburse parents for the cost of public bus transportation to send their children to schools, including schools with religious affiliations. By a 5 to 4 vote, the sharply divided Court ruled that the New Jersey statute approached the "verge" of constitutional power but that the bus transportation subsidy did not conflict with the Establishment Clause.

The result in *Everson* flowed from the majority's conception of the values fostered by the Establishment Clause and of the purposes underlying the New Jersey statute. The majority construed the Establishment Clause, when read in conjunction with the Free Exercise Clause of the First Amendment, as commanding the state "to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." At the same time, the majority viewed the New Jersey statute as being designed to safeguard the welfare of children wherever they attended school, "to protect children going to and from church schools from the very real hazards of traffic." Consequently, the bus transportation subsidy was comparable to "such general governmental services as ordinary police and fire protection . . . sewage disposal, public highways and sidewalks," all of which are available to and used by church-related schools and the students who attend them. Against that background, the majority declared that the state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."

The majority's articulated rationale was that New Jersey had done no more than "provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." The majority conceded that, as a result of the New Jersey statute, "children are helped to get to church schools. There is even a possibility that some of the children might not be sent to church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the state." But the majority also stressed that "[t]he State contributes no money to the [church] schools. It does not support them."

The *Everson* decision represented a significant but indecisive victory for the principle of public assistance for church-related education. If the New Jersey statute had been struck down, there would have been little hope for devising an aid program for church-related schools that would have survived constitutional scrutiny. However, the narrowness of the victory and the majority's

articulated rationale left serious doubts whether more substantial aid programs would be sustained by the Court. *Everson* established the principle that students in church-related schools could share in general welfare programs as long as the public funds flowed to the students or their parents and not to the schools. That principle has become known as the "child-benefit" concept. Whether the *Everson* reasoning could be extended beyond that narrow principle became the basis for considerable debate among constitutional scholars in the years following the decision.

2. Abington School District *v.* Schempp (1963)[8]

For two decades after the *Everson* decision, the development of Establishment Clause doctrine came in cases unrelated to the issue of financial aid to church-related education. For example, the Supreme Court in 1948 invalidated on Establishment Clause grounds Illinois' on-premises "released time" program which had permitted religious teachers to provide religious instruction in public schools.[9] Four years later the Court upheld New York's off-premises "released time" program which permitted public school children to be released early one day a week to attend religious instruction at their churches or synagogues.[10] In 1961, the Supreme Court upheld Sunday closing laws in the face of Establishment Clause challenges.[11] And, in 1962, the Court struck down New York's Regents' prayer that was prescribed for recitation at the opening of each public school day.[12] Through those several decisions, the Court appeared to be evolving a coherent Establishment Clause doctrine for testing the constitutionality of the interaction between government and religion in our society.

The doctrinal development seemed to reach a culmination in the case of *Abington School District* v. *Schempp* in 1963. That case decided appeals from Pennsylvania and Maryland challenging the constitutionality of the practice of devotional Bible reading in public school classrooms. The Court in *Schempp* reaffirmed that the basic value furthered by the Establishemt Clause was the preservation of government neutrality in matters touching upon the religious affairs of its people. To determine whether government action has breached the command of neutrality, the Court for the first

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[8]374 U.S. 203

[9]*McCollum* v. *Board of Education*, 333 U.S. 203 (1948)

[10]*Zorach* v. *Clauson*, 343 U.S. 306 (1952)

[11]*McGowan* v. *Maryland*, 366 U.S. 420 (1961)

[12]*Engel* v. *Vitale*, 370 U.S. 421 (1962)

time enunciated a test that seemed sufficiently comprehensive to decide most Establishment Clause challenges.

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion.

That *Schempp* formulation quickly acquired the label of the "purpose and primary effect" test. Applying that test to the facts before it in *Schempp*, the Court declared that the practice of devotional Bible reading in the public schools had a purpose and primary effect that clearly advanced religion and was, for that reason, inconsistent with the Establishment Clause.

3. Board of Education *v.* Allen (1968) [13]

For 21 years following the decision in *Everson*, the Supreme Court remained silent on the issue of public aid to church-related education. Then, in 1968, it agreed to hear and decide the case of *Board of Education* v. *Allen*. That case involved an Establishment Clause challenge to a New York statute that required local school boards to loan textbooks without charge to students in grades seven through twelve in both public and private schools, including those private schools with religious affiliations. Under the statutory scheme, the textbooks were loaned to individual students and not to the schools they attended.

By a 6 to 3 vote, the Court upheld the textbook loan law. Again asserting that the Establishment Clause was designed to preserve government neutrality in religious matters, the majority quoted the *Schempp* formulation of the "purpose and primary effect" test and applied that test to sustain the New York statute. However, the precise basis for the majority's ruling remains a matter of dispute.

At one point in its opinion, the majority noted that "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State." The majority then stated that "no funds or books are furnished

[13] 392 U.S. 236

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to parochial schools, and the financial benefit is to parents and children, not to schools." That language of the *Allen* opinion seems to adopt the "child-benefit" concept of aid which the *Everson* decision articulated. Appearing to echo further the *Everson* decision of 21 years earlier, the majority in *Allen* also observed: "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."

The majority in *Allen*, however, did not end its analysis with its reliance on *Everson* as supportive precedent. The appellants in *Allen* had argued quite forcefully that *Everson* was not controlling because free bus rides are constitutionally distinguishable from free textbooks. The appellants based that purported distinction on the contention that textbooks, unlike bus transportation, aid the educational process in church-related schools and that "[t]here is no such thing as secular education in a sectarian . . . school." That argument was not novel. It reflected some widely held misconceptions about church-related education, misconceptions that found expression in the dissenting opinions of Justice Jackson and Justice Rutledge in *Everson*. In effect, the appellants were arguing that the entire educational process of church-related schools is so permeated with religion that aid to any part of that process constitutes impermissible government support for religion.

The majority in *Allen* rejected that argument. Reviewing the Court's prior decisions, the majority declared that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education" and that "parochial schools are performing, in addition to their sectarian function, the task of secular education." The majority made it clear, however, that its statement on that issue was not necessarily conclusive. It noted that it was confronted with only a "meager record" in the *Allen* case and that nothing in that record supported the appellants' contention that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." The majority also stressed that "[n]o evidence has been offered about particular schools, particular courses, particular teachers, or particular books."

In effect, the majority rejected the appellants' invitation to create a constitutional presumption that the religious and secular educational processes of church-related schools are inseparable. Instead, the Court established a presumption that those schools perform separate and

distinguishable functions but indicated that the opponents of aid to church-related education could overcome that presumption by appropriate proof at a trial.

The *Allen* decision appeared to signal a favorable judicial climate for programs providing public assistance to church-related education. The Court had considered such programs only twice in its history and, on both occasions, had sustained the programs. In addition, *Allen* appeared to suggest that permissible aid programs could be broader than those designed for the health and safety of students and could extend to the educational processes of church-related schools. Yet the precise impact of *Allen* was to remain uncertain until the Court decided the *Tilton* and *Lemon* cases. The explicit recognition in *Allen* that church-related schools performed the distinct functions of secular education and religious training seemed to suggest that aid programs would be valid if the public funds supported only the secular educational functions of those schools. But the majority's stress on the "child-benefit" implications of *Everson* left uncertain whether public funds from such aid programs could flow directly to church-related schools.

4. Walz *v.* Tax Commission of the City of New York (1970)[14]

The Supreme Court's Establishment Clause doctrine acquired a new emphasis in 1970 when the Court decided the case of *Walz* v. *Tax Commission*. By an 8 to 1 vote, the Court in *Walz* upheld a provision of the New York Constitution and a New York statute exempting church property from taxation. The majority opinion was written by Chief Justice Burger, and it was his first important opinion on a major constitutional question.

The *Walz* opinion speaks of "the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses." In seeking that accommodation, "[t]he general principle deducible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion." Thus, the Chief Justice viewed the requirement of neutrality as flowing not so much from the Establishment Clause as from the need to adjust the competing, and occasionally conflicting, dictates of the Establishment and Free Exercise Clauses.-

In identifying the evils that the Establishment Clause was designed to guard against, the Chief Justice noted that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a

[14]397 U.S. 664

religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." He made reference to the "considerable internal inconsistency" in the Court's prior Establishment Clause decisions, but he viewed the principal function of the Establishment Clause to be the avoidance of "excessive" government "involvement" or "entanglement" with religion. The concept of "entanglement" or "involvement" had been discussed in some prior Establishment Clause opinions, but the majority opinion in *Walz* was the first to elevate that concept to the status of the central concern of the Establishment Clause.

In his analysis of the validity of exempting church property from taxation, the Chief Justice purported to apply the "purpose and primary effect" test that first found expression in *Schempp*. For example, he first found that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." He stressed that the state "has not singled out one particular church or religious group or even churches as such; rather it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."

It was in his "primary effect" analysis that the Chief Justice deviated from prior decisions. Rather than examine whether the primary effect of the property tax exemption was to advance or inhibit religion, he declared: "We must . . . be sure that the end result—the effect—is not *excessive government entanglement with religion.*" Declaring that the test of excessive entanglement "is inescapably one of degree," the Chief Justice concluded that the property tax exemption did not result in prohibited government involvement with religion. While conceding that the property tax exemption gave rise to some government involvement, the Chief Justice said it was a "lesser" involvement than taxing church property, which could lead to "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

The *Walz* decision was applauded by those church groups which faced financial disaster if their tax exemptions had been taken from them. But the potential impact of that decision and the doctrine it espoused on litigation involving aid to church-related education became a matter of some concern. The *Lemon* and *Tilton* cases had been heard and decided by the district courts before the Supreme Court decided *Walz*. The *DiCenso* case, however, had been tried and argued in the district court before the *Walz* decision but was decided after *Walz*. The *Walz* decision was the basis for the unanimous decision

in *DiCenso* invalidating Rhode Island's salary supplement program. In addition, the *Walz* decision contained one sentence that seemed to anticipate the school aid cases that would soon be argued in the Supreme Court. In contrasting tax exemptions with other government programs that benefit religion, the Court stated: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."

C. Arguments in the *Tilton* and *Lemon* Cases

It was against the background of the *Everson, Schempp, Allen* and *Walz* decisions that the parties in the *Tilton, Lemon* and *DiCenso* appeals prepared and presented their arguments to the Supreme Court on March 2 and 3, 1971. Those arguments reflected the possible constitutional theories available to the Court in deciding the three school aid appeals. Summarized below are the arguments presented by the appellants and the defendant colleges in the *Tilton* case, which are generally representative of the arguments made on the two sides of the school aid issue. Those arguments dealt with two basic questions: first, whether granting public funds to church-related schools constituted impermissible aid to religion; secondly, whether the administrative relationships between public officials and church-related schools that resulted from such grants of public funds led to excessive government entanglement with religion.

1. *Arguments for Appellants*

The appellants in the *Tilton* case were represented in the Supreme Court by Leo Pfeffer, who has built a reputation as one of the Nation's leading authorities on the consititutional issues implicit in church-state relationships. He is the author of a lengthy treatise on the subject, *Church, State and Freedom,* and he participated in several earlier Establishment Clause cases in the Supreme Court. His basic thesis was that the Establishment Clause bars any direct public financial assistance to "sectarian" educational institutions.

a. *The Aid Question*

The appellants in *Tilton* based their argument of an absolute Establishment Clause prohibition on all aid to sectarian schools on a

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single sentence in the majority opinion in *Everson*. That sentence reads as follows:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

The appellants viewed that sentence as the statement of the governing Establishment Clause principle on the issue of aid to church-related education, and they read that sentence as prohibiting government from giving any public funds to what they labeled "sectarian" schools. They argued that *Everson* had approved only those forms of aid that went to or benefited the student or his parents, as distinct from the school—an argument which they claimed found support in the "child-benefit" language of the *Allen* decision.

Read literally, the "no tax" language of *Everson* relied on by the appellants would bar public aid to any college or university which had a chapel or which offered any courses about religion. Such a literal reading would sweep within the constitutional prohibition all church-related colleges, a number of private colleges with no discernible church relationships or affiliations, and even a few public colleges and universities.[15] The appellants disclaimed any such literal reading of the "no tax" language and even stated that they were not seeking the disqualification of all church-related schools from public aid programs. Rather they claimed that the Establishment Clause prohibition contained in the "no tax" language extended only to "sectarian" colleges, which they defined as schools in which "the propagation, teaching or practice of religion is a meaningful or major part of [their] existence." In addition, the appellants constructed for the Court what they called a "composite profile" of a constitutionally ineligible "sectarian" college. According to the appellants, such a college is one

> which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity....

[15]Some state colleges and universities offer courses in religion or religious studies. In addition, the three service academies—West Point, Annapolis and the Air Force Academy—have chapels on their campuses and compel their cadets to attend religious services.

A college matching or closely conforming to that "composite profile," the appellants declared, could not receive public funds without violating the Establishment Clause.

The appellants' argument based on the "no tax" language of *Everson* was necessarily a rejection of the "purpose and primary effect" test of *Schempp* and *Allen*. In effect, the appellants contended that the "no tax" language of *Everson* created a separate and independent test of Establishment Clause validity that had not been displaced or superseded by subsequent Supreme Court decisions. The appellants, however, also fashioned an alternative argument based on the "purpose and primary effect" test. They asserted that *Schempp* and *Allen* barred public aid to any school which had as its purpose and primary effect the advancement or inhibition of religion. Since colleges fitting their "composite profile" of a sectarian college would have such a purpose and primary effect, the appellants argued that direct aid to such colleges was prohibited under the "purpose and primary effect" test.

The appellants dismissed as destructive of Establishment Clause values the ruling of the district court in *Tilton* that, under the *Allen* rationale, government could provide direct aid to the secular educational functions performed by church-related colleges. They contended that any such theory would permit the strictures of the Establishment Clause to be evaded by bookkeeping entries. The appellants declared that "[t]he money received by the college from the government goes into the same treasury as other moneys; it is used for the same overriding purpose, that is, to maintain the college so that it may propagate religion. Cost accounting is subordinate to, not superior to the Constitution."

b. *The Entanglement Issue*

The appellants found great solace in the *Walz* decision, which they read as barring any aid program that required "sustained and detailed administrative relationships" between government officials and church-related schools. The appellants noted that the Higher Education Facilities Act prohibited federal funding of any academic facility that would be used for "sectarian instruction" or "religious worship." The appellants agreed that such limitations were essential to prevent public funds from being used to support religious activities or instruction. But those limitations, according to the appellants, would require extensive policing and surveillance by federal officials to assure that religion did not find its way into the courses taught in buildings of church-related colleges financed by Title I funds.

The appellants' argument exposed the dilemma posed by the *Schempp* and *Allen* decisions, on the one hand, and the *Walz* decision, on the other hand. *Schempp* and *Allen* require that government programs contain adequate safeguards to prevent government power or money from being used to aid or advance religion. But the entanglement doctrine of *Walz* makes such statutory safeguards constitutionally suspect. The appellants expressed the dilemma quite colorfully when they observed that "in seeking to avoid the Scylla of sectarianism the statutory plan is necessarily engulfed in the Charybdis of entanglement."

2. *Arguments for the Defendant Colleges*

The defendant colleges and universities in *Tilton* had as their spokesman in the Supreme Court Edward Bennett Williams, one of the Nation's preeminent trial lawyers. Although the *Tilton* case was the first involving church-state relations that he had handled, his argument matched Mr Pfeffer's in its perception of the complex issues at stake. Mr Williams' central thesis was that government could provide direct assistance to the secular educational functions performed by church-related schools without infringing upon Establishment Clause values.

a. *The Aid Question*

The essential legal dispute between the appellants and the defendant colleges was whether the constitutional validity of aid programs benefiting church-related schools should be measured by the religious or non-religious nature of such schools or by the religious or non-religious nature of the educational function being supported by public funds. The appellants, by seeking to disqualify all "sectarian" schools, were arguing that the nature of the recipient schools was critical. The defendant colleges focused on the educational function being subsidized. The district court in *Tilton* had accepted the defendant colleges' position when, in discussing the primary effect phase of the *Schempp-Allen* test, it ruled that "[t]he focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid." The defendant colleges attempted to build on that concept in their Supreme Court argument.

The defendant colleges noted that the Court's prior decisions had uniformly prohibited government from using its power or funds to support religion or religious instruction. For example, in *McCollum*

v. *Board of Education*,[16] the Court invalidated Illinois' "released time" program because it amounted to "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." In *Everson*, however, the Court agreed that church-related schools could share in those public benefits which are "so separate and so indisputably marked off from the religious function" performed by church-related schools. The defendant colleges reasoned that the *Allen* decision, by explicitly acknowledging the secular-religious dichotomy in the functions performed by church-related schools, had provided the basis for determining whether government had impermissibly aided the religious functions of those schools. As long as government supported only the secular educational functions of those schools, the limitations of the Establishment Clause would be satisfied.

The defendant colleges argued that the Higher Education Facilities Act and the Title I grants they had received were constitutionally valid under the secular function test. Because the statute expressly prohibited the use of any Title I facility for sectarian instruction or religious worship, Congress had taken the necessary precautions to assure that federal funds awarded to church-related colleges would support only their secular functions. In addition, there was uncontradicted evidence that the defendant colleges' Title I facilities had been and would be used solely for non-religious purposes.

The defendant colleges also countered each of the appellants' arguments. They contended that the "no tax" language of *Everson* was never intended as a test of constitutional validity but rather was a generalized statement of an Establishment Clause concern which found its specific expression in the "purpose and primary effect" test of *Schempp* and *Allen*. The defendant colleges further argued that, by looking to the purpose and effect of schools receiving public aid, the appellants had distorted the "purpose and primary effect" test, which asked "what are the purpose and primary effect *of the enactment*" being challenged. Finally, the defendant colleges asserted that the "child-benefit" gloss that appellants placed on *Everson* and *Allen* would make the validity of a school aid program turn on its form rather than its substance.

b. *The Entanglement Issue*

The defendant colleges argued that the *Walz* decision did not create a new and independent test of Establishment Clause validity but

[16]333 U.S. 203 (1948)

simply supplemented the "purpose and primary effect" test. They pointed out that *Walz* had alluded to the potentially inhibitive effects on religion of excessive government entanglement with religion. They also noted that *Schempp* and *Allen*, while speaking of primary effects that advance or inhibit religion, appeared to focus only on whether the challenged programs advanced religion. Consequently, the defendant colleges contended that the *Walz* test of entanglement was a measure of whether government action inhibited religion and that administrative relationships growing out of an aid program should not be viewed as disabling unless they had an inhibiting effect on religion.

The defendant colleges also stressed that *Walz* talked of "excessive" government entanglement with religion and stated that the test of entanglement was inescapably one of degree. Thus, the mere fact that administrative relationships resulted between government officials and church-related schools should not create a constitutional infirmity. The defendant colleges noted that prior decisions had required government to assure that its actions did not aid or advance religion. They argued, therefore, that statutory or administrative safeguards designed solely to prevent government funds from supporting religion or religious activities were constitutionally required and could not be viewed as "excessive entanglement" within the meaning of the *Walz* decision.

On the basis of those arguments, the defendant colleges contended that no "excessive entanglement" of government with religion had resulted from the operation of the Higher Education Facilities Act. There was no evidence that the religious functions of any church-related colleges had been inhibited by the statute. In addition, the restrictions placed on the use of Title I facilities were carefully tailored to assure only that federal funds would not be used to subsidize religious worship or instruction.

III
THE DECISIONS OF JUNE 28

A. Some Unanswered Questions

The Supreme Court's decision to hear the three school aid cases came at a time when clarification of the constitutional issues in those cases was urgently needed. The public debates in the 1960s that accompanied the decisions of the federal and state governments to extend public assistance to church-related education contained a peculiar blend of policy and constitutional arguments. In many respects

the policy issues were more significant than the abstract constitutional questions. Those policy issues included whether government's limited resources for education should be restricted to the public schools and whether there was a legitimate legislative interest in preserving the educational diversity offered by private and church-related schools against the potentially monolithic structure of public education

Yet those important policy questions were often submerged in bitter arguments over whether church-related schools could constitutionally be included in educational assistance programs. Frequently the opponents of aid to private education would draw upon constitutional considerations to buttress their policy arguments, thus confusing issues of legislative policy and constitutional law that should have been separate and distinct. For example, the Constitution might permit certain forms of aid to church-related schools, but a legislature might nevertheless decide that the limited funds available could be better spent strengthening the public schools.

When constitutional considerations were injected into the debates over educational assistance programs, those debates frequently assumed strident and incoherent tones. Proponents and opponents of aid to church-related education could find support for their positions in the language of the Supreme Court's Establishment Clause decisions. Prior to the *Tilton, Lemon* and *DiCenso* appeals, however, the Supreme Court had ruled on only two very limited forms of assistance for church-related education. Those decisions provided equally limited guidance for legislators trying to design broader aid programs and for educators trying to meet their growing financial burdens. The decision of the Supreme Court to hear the *Tilton, Lemon* and *DiCenso* appeals seemed to indicate that the Court was ready to provide some needed clarification. The juxtaposition of the three appeals offered the Court an opportunity to answer three questions that remained unresolved in the public debates.

First, is aid to church-related colleges and universities constitutionally distinguishable from aid to church-related elementary and secondary schools? In 1961, the Department of Health, Education and Welfare prepared a memorandum on the issue of aid to church-related education that became the basic statement of the Kennedy Administration's position on that politically volatile question. The memorandum concluded that aid to church-related higher education would be constitutionally permissible but that aid to the lower levels of church-related education would be constitutionally proscribed. Several legal writers have advanced a similar thesis.

The suggested constitutional distinction between the higher and lower levels of church-related education is based, in part, on the assumption that religious indoctrination is the central goal of church-related schools but that such a goal is pursued less vigorously or less successfully at the college level. The Supreme Court had not spoken on that suggested distinction because it had never previously decided a case involving aid to higher education. The *Tilton* case would permit the Court to decide whether aid to higher education should have a different constitutional status than the aid to elementary and secondary schools involved in *Lemon* and *DiCenso*.

Second, can government give aid directly to church-related schools? The "child-benefit" language of both *Everson* and *Allen* had led some commentators to conclude by implication that direct aid to church-related schools was invalid. It appeared that both *Tilton* and *Lemon* would require the Court to decide whether the identity of the recipient of aid was constitutionally decisive, since the aid at issue in both cases flowed directly to church-related schools. The contested statute in *DiCenso*, however, required that the salary supplement payments be made directly to individual teachers and thus presented a "teacher-benefit" variation on the "child-benefit" theme.

Third, what impact would the entanglement analysis of *Walz* have on educational assistance programs benefiting church-related education? The dictum in *Walz*, warning that "sustained and detailed administrative relationships" in government grant programs could generate entanglement problems, presaged new constitutional difficulties for educational assistance programs. However, the administrative relationships established by the contested statutes in *Tilton*, *Lemon* and *DiCenso* were structured before the Court had articulated the entanglement test of *Walz*. In addition, those administrative relationships were designed principally to avoid aid to the religious functions of church-related schools—a requirement that was the central theme of the Court's pre-*Walz* decisions. Now those relationships would be evaluated for dangers not perceived when they were created.

B. The Decision in *Lemon* v. *Kurtzman*

The clarification that the Supreme Court provided in *Lemon* v. *Kurtzman* was not that hoped for by church-related schools. With Chief Justice Burger writing the majority opinion, eight justices agreed that Pennsylvania's Nonpublic Elementary and Secondary Education Act and Rhode Island's salary supplement program violated the Establishment Clause. Only Justice White, the author of the *Allen* opinion, raised a dissenting voice. While it is not yet possible to perceive all of

the ramifications of the *Lemon* decision, the Court's analysis and reasoning appear to disqualify elementary and secondary schools with strong ties to sponsoring churches from receiving most significant forms of direct public aid. Equally important for future legislation and litigation, the Court elevated the entanglement concept of *Walz* to the central focus of Establishment Clause analysis.

What follows is a summary of the Court's reasoning in *Lemon*—reasoning that was then applied in *Tilton* to uphold the constitutionality of the Higher Education Facilities Act.

1. *General Principles*

In its prior Establishment Clause decisions, the Supreme Court had developed the habit of examining the historical background of the Establishment Clause and discussing the core values protected by that constitutional provision. That habit was broken in the *Lemon* opinion. The Court did little more than acknowledge that it was entering an "extraordinarily sensitive area of constitutional law" and that the sparse language of the Religion Clauses provided it with few guideposts.

Also absent from the *Lemon* opinion is any reference to the concept of government neutrality, which was the dominant theme struck by earlier decisions in discussing core Establishment Clause values. The Court simply refers to the *Walz* decision and identifies the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"

The Court next makes clear that there is no single or uniform test for assessing the validity of the Pennsylvania and Rhode Island statutes. Rather, it refers to "the cumulative criteria developed by the Court" in its prior Establishment Clause decisions. From those decisions, it extracts three tests that must be applied. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" It then proceeds to apply those tests to the statutes before it.

2. *Purpose and Primary Effect Analysis*

The Court had no difficulty finding that the Pennsylvania and Rhode Island statutes had the requisite secular purposes. The Court noted that "the statutes themselves clearly state that they are intended to enhance the quality of secular education in all schools covered by

the compulsory attendance laws" and that such an objective was a legitimate legislative concern. Finding nothing in the record of either case to undermine the stated legislative intent, the Court held that the stated intent "must ... be accorded appropriate deference."

The Court's primary effect analysis was inconclusive. The Court noted the *Allen* decision had ruled that the secular and religious functions of church-related schools were not necessarily inseparable and that, by enacting the challenged statutes, the Pennsylvania and Rhode Island legislatures had reached the same conclusion. "In the abstract, we have no quarrel with this conclusion," the Court declared. But because church-related elementary and secondary schools "have a significant religious mission" and engage in a substantial number of religiously oriented activities, the legislatures had been required to create statutory restrictions to assure that the aid being supplied to those schools would support only their secular functions. The Court found it unnecessary to decide whether the legislatures had successfully limited the primary effect of the statutes "for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion." Thus, the question of whether a statute produces a primary secular effect becomes irrelevant if such an effect is achieved by means that give rise to prohibited entanglements.

3. *The Entanglement Analysis*

The Court identified the objective of the entanglement concept as seeking "to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other." It acknowledged that total separation of church and state—and, thus, total non-entanglement—was not possible. It pointed to fire inspections, building and zoning regulations, and state requirements under compulsory attendance laws as "examples of necessary and permissible contacts" between government and religion. In light of those necessary contacts, the Court was forced to acknowledge further that "the line of separation [between church and state], far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

Because entanglement thus emerged as a variable and fluctuating concept, the Court identified three factors to be evaluated in determining whether excessive entanglement was present in educational assistance programs. Those factors are "the character and purposes of the institutions which are benefited, the nature of the aid that

the State provides, and the resulting relationship between the government and religious authority."

a. *The Rhode Island Statute*

Apparently because the *DiCenso* appeal was in the factual setting of a full trial record, the Court's fullest exposition of the three indicia of entanglement came in its analysis of the Rhode Island salary supplement program. The Court's analysis illustrates the approach it may now be expected to take toward legal challenges to the eligibility of particular church-related schools for public financial assistance.

(i) *Character and Purposes of Recipient Institutions.* The Rhode Island statute provided assistance only to teachers in nonpublic elementary schools. At the time that the *DiCenso* case was decided by the district court, only teachers in Roman Catholic elementary schools had qualified for salary supplement payments. Consequently, in examining the character and purposes of institutions benefiting from the aid program, the Court considered only Roman Catholic parochial schools.

The evidence in the *DiCenso* case revealed that Roman Catholic parochial schools in Rhode Island possessed a number of distinctively religious characteristics, including proximity to the parish church, religious symbolism on and within school buildings, daily instruction in religion, and religiously oriented extracurricular activities. In addition, the Court noted that dedicated members of religious orders occupied two-thirds of the teaching positions in those schools and that the presence of nuns in the classroom enhanced the religious atmosphere of the schools. On the basis of those and other facts, the district court had concluded that the parochial schools were "an integral part of the religious mission of the Catholic Church" and that those schools were "a powerful vehicle for transmitting the Catholic faith to the next generation." The Supreme Court viewed it as significant that "[t]his process of inculcating religious doctrine" occurred in schools attended by students of an "impressionable age."

Basing itself on those factual conclusions, the Court ruled that "parochial schools involve substantial religious activity and purpose" and that the "substantial religious character" of the schools would lead to "entangling church-state relationships of the kind the Religion Clauses sought to avoid." It was because those schools engaged in considerable religious activity that the Rhode Island legislature had been compelled to impose strict controls to ensure that the salary supplement program would support only their secular education

functions. By so doing, the legislature had become ensnared in the thicket of entanglement.

(ii) *Type of Aid Provided.* The dangers of entanglement were compounded, in the Court's view, because of the type of aid the Rhode Island legislature had decided to extend to the parochial schools. The Court noted that the forms of aid approved explicitly and implicitly in *Everson* and *Allen*—bus transportation, school lunches, public health services and secular textbooks—were "secular, neutral, or nonideological." The Court felt that using public funds to supplement the salaries of teachers in religious schools could not fit that description. It took special pains to distinguish the textbook aid approved in *Allen*. It observed that, "[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."

The Court's disapproval of the salary supplement scheme of aid flowed essentially from its belief that teachers in parochial schools were subject to a strict regime of religious control and discipline. Thus, the Court observed:

> The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.

The Court was not dissuaded from that view of the parochial school teacher by the uncontradicted testimony of several teachers that they did not inject religion into their secular courses. The Court's concern was with the "potential if not actual hazards" of the apparent conflict between a parochial school teacher's obligations to the religious authorities who hire him and to the state which pays him to teach strictly secular courses.

By stressing the "potential" conflicts faced by the teachers, the Court appeared to be questioning the integrity of those teachers who promise to engage in solely secular instruction in exchange for the salary supplement. The Court tried to disclaim any such intention.

> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by

> neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.

After reading that portion of the *Lemon* opinion, an attorney close to the case observed: "You have to feel sorry for the Catholic lay teacher. For years he has been underpaid and now he is told by the Supreme Court that he is not to be trusted."

(iii) *Resulting Administrative Relationships.* Because the parochial schools have a substantial religious character and because teachers in those schools receiving state funds faced potentially conflicting obligations, the Court ruled that excessive government entanglement with religion would be the inevitable consequence of the salary supplement program. The Court noted that the legislature "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts." As a result, the legislature imposed strict restrictions on what could be taught by a teacher receiving a salary supplement. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." Such surveillance, according to the Court, was the very type of entanglement that *Walz* prohibits.

The Court also pointed to another form of prohibited entanglement written into the Rhode Island statute. Because only nonpublic schools spending less per pupil for secular education than the public schools could benefit from the act, nonpublic schools submitted an accounting of their operating expenses to the State Department of Education. The reporting form did not distinguish between costs for secular and religious education. If a particular school's total educational expenditures closely approximated those for the public schools, the State Department of Education was required to make an allocation of those expenditures among the school's secular and religious functions. The Court ruled that "[t]his kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids."

b. *The Pennsylvania Statute*

The Court did not engage in a lengthy analysis of Pennsylvania's Nonpublic Elementary and Secondary Education Act. Rather, because the bulk of the funds under that statute reimbursed schools for teachers' salaries and because the complaint described "an educational system that is very similar to the one existing in Rhode Island," the Court

ruled that it had the same constitutional defects as the Rhode Island statute. The Court simply pointed to a few features of the Pennsylvania act which, if anything, made it even more unconstitutional.

Principal among those additional defects was the fact that the public funds in Pennsylvania flowed directly to church-related schools. "This factor," the Court said, "distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school." The Court noted that direct government grants are traditionally accompanied by strict accounting and other administrative requirements that would foster prohibited entanglement.

The Court also stressed that the Pennsylvania statute limited the aid to reimbursing nonpublic schools for the cost of teaching only certain secular subjects. The statute required participating schools to establish accounting procedures to permit the state to verify the cost of the secular, as distinguished from religious, instruction and further required regular audits by the state of the books of participating schools. The Court stated that "the government's postaudit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state."

c. *Other Prohibited Entanglements*

The *Lemon* opinion also identified a "broader base of entanglement" that was unrelated to the specific provisions of the Rhode Island and Pennsylvania statutes. The Court feared that approval of those two statutes would encourage religious groups sponsoring schools to seek new forms and additional amounts of aid. The opponents of such aid could be expected to make a political issue of the question, forcing candidates to declare themselves on the issue and voters to choose between aid or no aid. The Court felt "[i]t would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith." The Court then declared that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

The Court recalled its observation in *Walz* that "adherents of particular faiths and individual churches frequently take strong positions on public issues" and asserted that "[w]e could not expect otherwise, for religious values pervade the fabric of our national life." However, *Walz* was concerned with a tax exemption that existed "for the benefit of all religious groups." Educational assistance programs, however, "benefit

relatively few religious groups" which maintain schools. For that reason, "[p]olitical fragmentation and divisiveness on religious lines is . . . likely to be intensified" by such programs. The Court also noted that the Pennsylvania and Rhode Island programs required continuing annual appropriations to keep them functioning, thus creating "the likelihood of larger and larger demands as costs and populations grow."

C. The Decision in *Tilton* v. *Richardson*

Church-related higher education scored an uncomfortably narrow victory in the *Tilton* case. By the slimmest of margins, a 5 to 4 vote, the Court sustained the constitutionality of the Higher Education Facilities Act and ruled that the four defendant colleges were constitutionally eligible to receive federal funds under that statute. Chief Justice Burger wrote the principal decision, but only three other justices—Harlan, Stewart and Blackmun—agreed with his reasoning. Justice White cast the decisive fifth vote in a separate opinion that expressed more sweeping approval of aid to church-related education than the more narrowly drawn Burger opinion. Thus, a full understanding of the result in *Tilton* requires analysis of both the Burger and White opinions.[17]

1. *The Burger Opinion*

As he did in the *Lemon* opinion, the Chief Justice opens his analysis in the *Tilton* with the admonition that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." He even warns that there are "risks" in viewing the criteria evolved in prior Establishment Clause decisions as "tests." "Constitutional adjudication," he asserts, "does not lend itself to the absolutes of the physical sciences or mathematics." He repeats that the criteria stated in prior decisions are "cumulative" in their impact and that the validity of the challenged statute rests on the answers to three questions: "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion?"

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[17]Justice Douglas wrote a dissenting opinion in *Tilton* that was joined by Justices Black and Marshall. Justice Brennan wrote a separate opinion to express his views in both the *Lemon* and *Tilton* cases, and that separate opinion states the reasons that he would invalidate the Higher Education Facilities Act. In essence, the Douglas and Brennan opinions would impose an absolute constitutional bar to any direct public assistance for "sectarian" schools. This paper will not discuss those dissenting views in detail.

The answer to the first question presented no difficulty. The Chief Justice accepted at face value the Congressional statement that the security and welfare of the Nation required federal assistance to permit colleges and universities to expand their facilities "to accommodate rapidly growing numbers of youth who aspire to a higher education." That statement "expresses a legitimate secular objective entirely appropriate for governmental action." The bulk of the Chief Justice's opinion was devoted to analyzing whether the statute had a primary secular effect and whether excessive entanglement with religion resulted.

a. *The Primary Effect Analysis*

The Chief Justice began his primary effect analysis by rejecting the "simplistic argument that every form of financial assistance to church-sponsored activity violates the Religion Clauses." He noted that the Court had already approved bus transportation subsidies, free textbooks and tax exemptions that conferred tangible benefits on religious bodies. In addition, he cited the Court's 1899 decision in *Bradfield* v. *Roberts*,[18] which upheld a federal construction grant to a hospital operated by a religious order. Thus, the critical question was not whether a religious institution benefited from a government aid program but whether such a program generated the requisite primary secular effect.

The Chief Justice conceded that, despite legislative efforts to restrict aid to the secular functions of religious institutions, the legislative design might be "subverted by conscious design or lax enforcement." But, in contrast to his concern in *Lemon* for potential violations of the state statutes, the Chief Justice declared that "judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." He found that the Higher Education Facilities Act had been carefully drafted to restrict funded facilities to secular uses and to prohibit use of those facilities for religious instruction or worship. He also noted that, in the administration of the statute, some church-related institutions had been threatened with loss of their federal funding for not complying with the statutory restrictions.

The Chief Justice then briefly reviewed the evidence presented at trial showing that "none of the four church-related institutions in this case has violated the statutory restrictions." That evidence established that the Title I facilities at those schools had not been used for religious worship or instruction, that there were no religious symbols or plaques

[18]175 U.S. 291 (1899)

in or on them and that they had been used for solely non-religious purposes. "On this record, therefore, these buildings are indistinguishable from a typical state university facility," the Chief Justice commented.

The Chief Justice next rejected the appellants' argument that the "no tax" language of *Everson* barred all direct public aid to church-related schools. Rather, he viewed the purpose and primary effect language of *Schempp* and *Allen* as the controlling criteria for analysis. Under those criteria, the appellants' no-aid theory depended on their argument that "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." The Chief Justice noted that the Court in *Allen* and the Congress in enacting the Higher Education Facilities Act had rejected that argument and that the evidence presented at trial provided no support for it.

The Chief Justice found that the Title I facilities of the defendant colleges—two libraries, a science building, a language laboratory and a fine arts building—were peculiarly unsuited for religious permeation. For example, the evidence showed that no classes had been conducted in the two libraries and no religious restrictions were placed on book acquisitions. There was also affirmative evidence that no religion "seeps into the use of any of these facilities." The parties had stipulated that courses at the four defendant colleges were "taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards." The evidence also revealed that all four colleges subscribed to the 1940 statement on academic freedom adopted by the American Association of University Professors and the Association of American Colleges and that "the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination."

Based on that analysis, the Chief Justice concluded that the challenged statute had the required primary secular effect. He also declined the appellants' invitation to determine the primary effect by deciding whether a college fitting their "composite profile" could constitutionally receive Title I funds. The Chief Justice, noting that none of the four defendant colleges fitted such a profile, characterized that argument as presenting a "hypothetical" problem. He did not, however, foreclose the possibility that the appellants could succeed with that argument in the future. He declared that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess [the] characteristics" described by appellants.

That sentence—perhaps the most troubling in the Chief Justice's opinion—clearly suggests that each church-related college may in the future be required to establish its constitutional eligibility for public aid.

Although the Chief Justice concluded that the statute as a whole had produced a primary secular effect, all of the justices agreed that one section of the act had an unconstitutional religious effect. Section 754 declared that the federal government would have received full value for the amount of Title I grants if funded facilities were used for the purposes set forth in the statute for twenty years. Under section 754(b)(2), a college or university was required to observe the prohibition against use of a Title I facility for religious worship or instruction during the twenty-year period. If there were such a prohibited use of a Title I facility during that period, the federal government reserved the right to recover a pro rata share of the value of the building.

The Chief Justice construed section 754 (b) (2) to mean that, upon the expiration of the twenty-year federal interest, a church-related college could use a Title I facility for religious purposes. Because most Title I facilities would have useful lives far in excess of twenty years, "the unrestricted use of a valuable property [after twenty years] is in effect a contribution of some value to a religious body." If after twenty years a Title I facility were converted into a chapel or used to promote religious interests, "the original federal grant will in part have the effect of advancing religion." For that reason, section 754 was unconstitutional in limiting for only twenty years the uses made of Title I facilities by church-related colleges. However, because the Court did not view that provision as critical to the total statutory scheme, it ruled that section 754 was severable from the rest of the act and did not taint other valid provisions of the statute.

b. *The Entanglement Analysis*

Chief Justice Burger's entanglement analysis was essentially an effort to distinguish the Higher Education Facilities Act, and the involvements it gave rise to, from the two state statutes struck down in the *Lemon* decision. At the root of that distinction was the Chief Justice's belief that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." He was persuaded that religious indoctrination and "sectarian influences" play a lesser role at the college level of church-related education. "[M]any church-related colleges and universities," he observed, "seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom."

Equally significant was the Chief Justice's belief that "college students are less impressionable and less susceptible to religious indoctrination" than parochial school pupils. "The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations" in allocating public funds by a church-related college. Against that background, drawn from the writings of law professors and educators, the Chief Justice examined the evidence in the *Tilton* case as it related to the three indicia of entanglement he had specified in his *Lemon* opinion.

(i) *Character and Purposes of Recipient Institutions.* It is instructive to list the evidence cited by the Chief Justice to support his conclusion that "religious indoctrination is not a substantial purpose or activity" of the four defendant colleges. He noted that all four schools "are governed by Catholic religious organizations" and have faculties and student bodies that are predominantly Catholic in their religious composition. However, "non-Catholics were admitted as students and given faculty appointments" at the four colleges. None of those institutions required its students to attend religious services.

The Chief Justice also discussed how religion was taught at the defendant colleges. He noted that "all four schools require their students to take theology courses." However, he also stressed that

> the parties stipulated that these [theology] courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious values and are not limited to courses about the Roman Catholic religion.

He also pointed out that required theology courses at two of the defendant schools were taught by rabbis and that all of the schools "introduced evidence that they made no attempt to indoctrinate students or to proselytize." That evidence acquired extra force since "these four schools subscribe to a well-established set of principles of academic freedom, and nothing in the record shows that these principles are not in fact followed."

In light of that evidence, the Chief Justice found that the defendant colleges were "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." Because the schools were of that character, there was less likelihood that religion would permeate secular education, less risk that government funds would support religious activities, and less need for intensive government surveillance that could produce prohibited entanglements. Those factors served to distinguish many of the invalid features of the aid programs struck down in the *Lemon* decision.

(ii) *Type of Aid Provided.* The danger of entanglement was also lessened because the aid provided under the Higher Education Facilities Act was of a "nonideological character." The Chief Justice construed "[o]ur cases from *Everson* to *Allen*" as allowing "church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend." The aid for teachers' salaries provided under the Pennsylvania and Rhode Island statutes was constitutionally suspect because "teachers are not necessarily religiously neutral." Under the Higher Education Facilities Act, however, "government provides facilities that are themselves religiously neutral" and, as a result, "[t]he risks of government aid to religion and the corresponding need for surveillance are . . . reduced."

(iii) *Resulting Administrative Relationships.* There was a further reduction in the risk of entanglement because Title I aid "is a one-time, single-purpose construction grant." Unlike the Pennsylvania and Rhode Island programs, "[t]here are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." While some administrative relationships between federal officials and church-related colleges resulted, "[i]nspection as to use [of Title I facilities] is a minimal contact."

(iv) *Conclusion.* The Chief Justice emphasized in concluding his entanglement analysis that "[n]o one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*." He also found less "potential for divisive religious fragmentation in the political arena." He conceded that "[t]his conclusion is admittedly difficult to document." But he thought it could be explained by "the character and diversity of the recipient colleges and universities and the absence of any intimate continuing relationship or dependency between government and religiously affiliated institutions."

2. *The White Opinion*

Justice White's separate opinion expressed his views in the three school aid appeals. He accepted the result reached by Chief Justice Burger in the *Tilton* case, but he rejected the Chief Justice's reasoning as "curious and mystifying." In addition, he would have sustained the constitutionality of the Rhode Island and Pennsylvania statutes, but he would have

sent the Pennsylvania cases back to the district court for a trial to determine whether aid to the defendant schools in that case was consistent with his constitutional theory.

Justice White's opinion is essentially an incisive critique of the inconsistent and irreconcilable opinions that Chief Justice Burger wrote in the *Lemon* and *Tilton* cases. He states what, for him, is the controlling constitutional principle in a single, brief paragraph:

> It is enough for me that the States are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion.

It is not clear whether Justice White views the entanglement concept as at all relevant to the constitutional issues implicit in aid to church-related education. He is content with pointing out the logical inconsistencies in Chief Justice Burger's entanglement analysis in *Lemon* and *Tilton*. The fundamental fault that he finds in that analysis is that it impales educational assistance programs on the horns of a dilemma.

> The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.

The ' paradox" described by Justice White will surely cause legislatures the greatest difficulty when they seek to shape future aid programs to meet the constitutional requirements set forth in the *Lemon* and *Tilton* decisions.

Perhaps the most critical aspect of Justice White's opinion—apart from the fact that it provided the crucial fifth vote in the *Tilton* case—is the footnote with which he concludes. That footnote reads as follows:

> As a postscript I should note that the Court decides both the federal and state cases on specified Establishment Clause considerations, without reaching the questions that would be presnted if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

Because he was the swing vote in the *Tilton* case, Justice White's views on the issues he highlights in that footnote will be decisive in future litigation involving aid to church-related higher education.

IV
IMPLICATIONS OF THE JUNE 28 DECISIONS

A. Some General Observations

When the Supreme Court agreed to hear the *Tilton*, *Lemon* and *DiCenso* appeals together, the fear was expressed that the presence of the three cases would offer a Court reluctant to grant a blanket endorsement of aid to church-related education an opportunity for a compromise decision. The conflicting and inconsistent decisions in *Lemon* and *Tilton* smack of such a compromise. The compromise has been struck in favor of aid to church-related higher education and against aid to the lower levels of church-related education. However, the very inconsistencies in those decisions suggest that the constitutional status of aid to higher education will be anything but stable in the immediate future.

Some of the assumptions that form the basis for the sharp constitutional line that Chief Justice Burger has drawn between the higher and lower levels of church-related education are open to serious question. Perhaps the most critical of those assumptions is the Chief Justice's assertion that "college students are less impressionable and less susceptible to religious indoctrination." That assumption will withstand analysis only if one accepts the premise on which it is based. The Chief Justice observed in his *Lemon* opinion that the possibility of religious indoctrination was "enhanced by the impressionable age of the pupils, in primary schools particularly." The contrast that he was drawing in *Tilton* was between the college student on the one hand and the elementary school pupil on the other hand. There can be little quarrel with the assumption that a third grader will be more impressionable, and thus more susceptible to religious indoctrination, than a college sophomore. But the contrast is less sharp when one compares a high school senior and a college freshman. A constitutional principle that rests on the degree of impressionability of students at different levels of education is as shifting and variable as the intellectual maturity and resiliency of particular students.

Justice White was singularly unimpressed by Chief Justice Burger's emphasis on the lesser impressionability of college students. He labeled that argument "makeweight," noting that "[i]f religious teaching in federally financed buildings was permitted [by the statute], the powers of resistance of college students would in no way save the federal scheme."

Chief Justice Burger really seems to be saying that, even if church-related colleges engage in a determined program of religious indoctrination, there is little to fear because the intellectual maturity of college students dooms those efforts to failure. Carried to its logical extension, that thesis would be most destructive of core Establishment Clause values. Such a thesis, for example, would permit government to subsidize the proselytizing activities of churches as long as the government chose those churches which were meeting little success in such efforts. No governmental undertaking could be more inconsistent with the Establishment Clause.

Whatever the validity of its underpinnings, the distinction drawn in *Tilton* between the higher and lower levels of church-related education is now embedded in the fabric of Establishment Clause doctrine. Church-related colleges can take some comfort in that fact. There is less cause for optimism in the analytical framework that the Court has constructed for assessing the validity of future aid programs. Each form of aid must be separately scrutinized, and each church-related college must be examined individually to determine its constitutional eligibility. There is no uniform or predictable "test" that can be applied to make those judgments. Rather, the constitutional restraint consists of nothing more than a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." And each particular relationship or program must be set against a series of criteria that must be applied cumulatively. It is fair to say that the constitutional status of aid to church-related higher education is far more confusing today than it was ever thought to be prior to the *Tilton* and *Lemon* decisions.

B. Constitutional Status of Church-Related Colleges

As a result of the *Tilton* and *Lemon* decisions, the constitutional validity of education assistance programs benefiting church-related colleges and universities must now be evaluated from three perspectives. First, for purposes of determining the statute's primary effect and the potential for prohibited entanglement, the character and purposes of church-related schools benefiting from the statute must be examined. Second, the form of aid prescribed by the statute must be scrutinized to determine whether that aid, by its very nature, could lead to excessive entanglement. Third, the administrative relationships that ensue between public officials and church-related schools must be so structured that prohibited entanglements do not result.

Church-related colleges and universities can be expected to have a very real concern for all three of those factors as legislatures now seek

to shape new aid programs to comply with constitutional requirements. For example, church-related colleges will not want to lend their support to proposed aid programs that in form will run afoul of the principles of the *Tilton* and *Lemon* decisions. The *Tilton* case at least established the principle that aid can be given directly to church-related institutions. However, both *Tilton* and *Lemon* suggest that, to be valid, such aid must be "in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend." The precise meaning of that limitation must await future litigation. It clearly requires, however, that the aid must be available to all institutions of higher learning and that church-related schools not be singled out for special benefits.

Church-related colleges can also play a role in shaping the administrative relationships that will later be tested for excessive entanglement. Statutes creating aid programs typically prescribe general limitations on the use of public funds but leave to the government agency administering the program the power to promulgate regulations which establish the method of enforcing the statutory limitations. Parties affected by those regulations generally are allowed to have a voice in their development. As a result, church-related colleges can have the opportunity to prevent from developing, through administrative oversight or carelessness, a regulatory scheme that would torpedo an otherwise valid aid program.

The central focus of this paper is on the first of the three analytical factors considered by the Supreme Court in *Tilton* and *Lemon*—the character and purposes of institutions benefiting from public aid programs. That factor will produce the most tangible of the repercussions of the *Tilton* case felt by church-related colleges, for it will require each church-related college to establish and justify its constitutional eligibility for public funds.

The precise scope of that undertaking is difficult to assess. While it discussed various features of church-related schools in the *Tilton* and *Lemon* decisions, the Supreme Court did not expressly designate those features, in whole or in part, as the total of the relevant criteria for evaluating a school's character and purpose. Thus, the criteria by which church-related colleges are to assess their constitutional eligibility for public support remain uncertain.

In addition, whatever criteria are employed must be applied cumulatively. Such a process detracts from objective and predictable decision-making and tends to foster subjective judgments that have little relevance beyond the particular case being decided. A college will never know when the elements of its church relationship will add up to too great a religious orientation in its educational program.

Finally, the variables that inhere in the cumulative criteria to be applied are compounded by the great variety of relationships that colleges have with churches or religious organizations. Even among colleges affiliated with a particular denomination, a decision that one college is eligible or ineligible for public funds will not necessarily be determinative of the status of the other schools.

Despite these complexities, it is possible to offer some general guidance to church-related colleges which must now engage in some soul-searching to determine whether they can count on the continued availability of public funds to ease their financial problems.

1. *The Search for Sectarianism in Education*

Church-related higher education passed its first constitutional test because five Supreme Court justices agreed that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." It is interesting to note that church-related colleges passed muster not necessarily on their own merits but in contrast to other types of church-related schools. The model chosen for drawing the contrast was a particular genre of church-related schools—Roman Catholic elementary schools attached to and operated by a parish under diocesan supervision. It is not surprising that church-related colleges fared well in comparison to Roman Catholic parochial schools. What is surprising, however, is that the four dissenting justices saw no meaningful difference between a church-related college and a parochial school in terms of their religious orientation, character and purposes.

The disturbing aspect of the *Tilton* decision is that eight Supreme Court justices agreed that a college's religious or non-religious character is critically determinative in judging the validity of an educational assistance program. Those eight justices disagreed only in their ability to perceive differences of constitutional significance in the various levels of church-related education. Chief Justice Burger and the three justices who joined his opinion recognized that there were such differences and thus showed themselves to be more discriminating observers of the educational world than the four dissenting justices. Only Justice White considered a school's religious or non-religious character irrelevant to the constitutional issues in the *Tilton* case.

As a consequence, the plaintiffs in the *Tilton* case lost the initial constitutional skirmish but won their argument with the defendant colleges over whether the character of a school benefiting from public aid or the character of the educational function supported by that aid is constitutionally controlling. The plaintiffs framed that issue in terms of

whether a "sectarian college" could receive public funds without violating the Establishment Clause. The term "sectarian college" is unfortunate and perhaps self-contradictory. However, that term is a useful shorthand description of the type of institution that will find its eligibility for public funds in jeopardy following the *Tilton* and *Lemon* decisions. It is also an appropriate term in light of the search for sectarianism in education that is now mandated by those decisions.

2. *Source of Future Challenges*

Church-related colleges and universities can expect to have their eligibility for public funds attacked from two sources in the future. The most obvious form of opposition will come in lawsuits by such organizations as the American Civil Liberties Union and the American Jewish Congress, which have an ideological antipathy to any public funding of church-related education and which generated and managed the *Tilton*, *Lemon* and *DiCenso* cases. In fact, within a week after the Supreme Court's June 28 rulings, those two groups announced plans to file suits challenging six state statutes providing aid to nonpublic elementary and secondary schools.

The second source of challenge will be government officials charged with administering educational assistance programs. Those men must now satisfy themselves that church-related colleges benefiting from such programs have the requisite character and purposes for constitutional eligibility. The litigation process can be a time-consuming and costly method for establishing eligibility. On balance, however, there are probably fewer risks to church-related colleges in having their eligibility hinge on a judicial, rather than an administrative, decision.

Government administrators are by nature a cautious group. If he must err, an administrator prefers to err in a manner that will not bring official censure. This characteristic can have important consequences for the church-related college whose constitutional eligibility presents a close question. Rather than award such a college public funds, and risk being reversed by a court in a taxpayers' suit challenging that award, the administrator might well declare the college ineligible.

The college could, of course, contest such a decision in the courts. But it would face a more formidable task than the taxpayer who challenged the contrary decision. The taxpayer would be arguing that the administrative action violated the constitutional ban on aid to a sectarian college. Since no constitutional proscription is breached when a church-related college is wrongly denied public funds, the college could only argue that the administrator made an error in judgment based on a misunderstanding of the relevant facts. Courts have no hesitancy in ruling on administrative actions that allegedly conflict with

the Constitution. But they are reluctant to interfere with the administrative process when the only claim is an error in judgment or a mistake based on an assessment of disputed facts.

The real difficulty with the administrative process is its low visibility. The administrator will really be the adversary of a church-related college in the search for sectarianism; but he will also be the evaluator and the judge of the facts leading to a college's disqualification. While the administrator will be required to act on the basis of pre-established criteria, the college will have no opportunity for a hearing before the decision on its eligibility is made. Once that decision is reached, courts will not upset a ruling of ineligibility unless the college can show that it was arbitrary and capricious. That is an extremely difficult showing to make.

The litigation process stands in sharp contrast to the administrative process. Those challenging a college's eligibility will be required to justify in court the criteria they claim applies and to produce facts to support the application of such criteria. The college can contest the validity of the criteria proposed by the plaintiffs and present evidence favorable to a finding of eligibility. The conflicting criteria and facts will be evaluated by an impartial court, and its decision will be subject to normal appellate review. That very process was followed in the *Tilton* case, and the four defendant colleges prevailed.

The difficulties of working within the administrative process, on the other hand, are illustrated by the operation of New York's Bundy Law, which provides institutional grants to colleges and universities based on the number of degrees awarded. Soon after that law went into effect, the New York Commissioner of Education sent a questionnaire to church-related colleges and universities seeking information on the degree of their church-relationships. Relying on the responses to that questionnaire, and nothing more, the Commissioner declared 21 schools ineligible for aid. More than two years after that administrative decision, only one of the affected colleges has been successful in obtaining a court reversal of the Commissioner's action. Several other colleges are still seeking judicial relief. In the meantime, they have lost more than two years of funding under the statute.

In sum, a church-related college's eligibility for public funds will not necessarily escape official scrutiny if it is not named as a defendant in a taxpayers' suit. It may still have to establish its eligibility to the satisfaction of the official administering those funds.

3. *Criteria of Sectarianism*

The major issue left unresolved by the *Tilton* decision is the criteria to be applied to determine whether the character and purposes of a church-related college satisfy constitutional requirements. The *Tilton* decision is not unusual in that respect. The Supreme Court's function is to decide the broad principles that govern an issue of constitutional law. The high court generally prefers to have the lower courts evolve in subsequent litigation the criteria for applying those broad principles.

As framed in the *Tilton* and *Lemon* decisions, the issue for lower courts to decide in future cases challenging higher education assistance is whether particular church-related colleges benefiting from such assistance have a "substantial religious character" or a "significant religious mission." In making that determination, a lower court can look to several sources for the criteria to apply.

a. *The* Horace Mann *Decision*

In 1966, in the case of *Horace Mann League* v. *Board of Public Works*,[19] the Maryland Court of Appeals ruled on the precise question of whether four church-related colleges could constitutionally receive state funds for the construction of dormitory and classroom facilities. The defendant colleges were two affiliated with the Roman Catholic Church (Notre Dame College and St Joseph's College), one affiliated with the Methodist Church (Western Maryland College) and one affiliated with the United Church of Christ (Hood College). The central question, as the Maryland court viewed it, was whether those colleges were "legally sectarian" and thus ineligible under the Establishment Clause to receive public funds. The court's review of the evidence in the case convinced it that three of the colleges—Notre Dame, St Joseph and Western Maryland—were "legally sectarian" but that Hood's religious relationship was not sufficiently intense to impose a constitutional disability.

The focus of the *Horace Mann* case is the focus now required by the *Tilton* decision. For that reason, the criteria of sectarianism applied in the *Horace Mann* case are possible reference points for other courts engaged in higher education litigation. In fact, the Wisconsin Supreme Court applied the *Horace Mann* criteria in a case challenging a grant of public funds to the Marquette University School of Medicine.[20] The plaintiffs in the *Tilton* case structured their trial evidence around the *Horace Mann* criteria and urged the district court to adopt those

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[19]242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966)

[20]*State ex rel. Warren* v. *Reuter*, 170 N.W.2d 790 (1969)

criteria in evaluating the sectarian character of the defendant colleges. The district court declined to follow the *Horace Mann* decision, labeling it "inconsistent" with Supreme Court Establishment Clause decisions. However, the reasoning employed by Chief Justice Burger in his *Tilton* opinion now suggests that *Horace Mann* may not be incompatible with the Court's Establishment Clause doctrine.

The Maryland Court of Appeals isolated six major factors as relevant in determining whether a college is "legally sectarian." Those factors are as follows:

1. The stated purpose of the college

2. The religious affiliations of the college's personnel. The personnel examined included the members of the governing board, the administration, the faculty and the student body. The court examined whether any religious test was applied for employment at the college or admission to the student body and whether there was a requirement that members of the governing body be of a particular religious faith or affiliated with a church or religious society.

3. The college's relationship with religious organizations and groups. The court inquired into the ownership of the college, the amount of financial support received from church sources, the college's membership in or affiliation with religious organizations (such as the National Catholic Educational Association), and the use of the college's facilities for supplementary religious purposes (such as making college facilities available to outside religious groups for meetings and conferences).

4. The place of religion in the college's program. The court looked at a number of factors under this heading. They included the physical manifestations of the college's religious relationship, religious observances sponsored or encouraged by the college (including whether students were required to attend religious services), the availability of religious services for those not members of the sponsoring church, the character of religion (and philosophy) courses offered by the college (including whether students were required to take religion courses), the relation of religion (and philosophy) to the rest of the curriculum, religious restrictions on academic freedom, and the place of religion in the extra-curricular program.

5. The result or "outcome" of the college program. This factor required an examination of the activities of the college's alumni to evaluate the long-range impact of the college's religious program.

6. The work and image of the college in the community. This is the most nebulous of the *Horace Mann* criteria. It requires a court to determine whether persons living in the community where the college is located consider the college to be a religious institution.

Simply listing the various factors to be considered illustrates how far-reaching is the inquiry mandated by the *Horace Mann* criteria. No facet of a college's religious relationship escapes scrutiny.

b. *The Pattillo-Mackenzie Criteria*

In their 1966 report for the Danforth Foundation, entitled *Church-Sponsored Higher Education in the United States,* Manning M. Pattillo, Jr and Donald M. Mackenzie developed six criteria to identify the colleges and universities that were the objects of their study. Those criteria are as follows:

1. Whether the college's governing board includes members of a sponsoring church and/or members nominated and/or elected by that church body;
2. Whether the college is owned by a religious body;
3. Whether the college receives financial support from a religious body;
4. Whether the college accepts the sponsoring church's denominational standards or uses the denominational name;
5. Whether the college's statement of purpose links it to a particular denomination or reflects a religious orientation;
6. Whether church membership is a factor in the selection of faculty and administrative personnel.

The Pattillo-Mackenzie criteria are not necessarily relevant to the constitutional considerations that grow out of the *Tilton* decision. They were devised to identify schools with religious affiliations and not to assess the intensity of those affiliations. A college meeting just one of the six criteria was classified as "church sponsored."

Nevertheless, Dr Pattillo and Dr Mackenzie are respected educators, and a court might be persuaded to draw upon their study in its search for sectarianism. In fact, Chief Justice Burger cited the Pattillo-Mackenzie study in his opinion in *Tilton*. In addition, Dr Pattillo was an expert witness in the *Horace Mann* case, and the criteria contained in his study were blended into the total *Horace Mann* criteria.

c. *The "Composite Profile" of a Sectarian College*

The appellants in the *Tilton* case argued that what the Establishment Clause forbade was aid to a school matching their "composite profile" of a sectarian college. See p. 15, *supra*. Chief Justice Burger labeled that argument "hypothetical" and refused to consider it, because none of the four defendant colleges matched that profile, and the record in the case failed to show that any college with such characteristics had been awarded funds under the Higher Education Facilities Act. However, the Chief Justice said that such an argument could be considered

"if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess those characteristics."

The "composite profile" pictures the sectarian college in its most extreme posture. Excepting seminaries and schools of divinity, it is doubtful if there are many institutions of higher learning that possess the characteristics described in the "composite profile." The appellants in the *Tilton* case contended that a school need not have all of the characteristics they described in the "composite profile" to be an ineligible sectarian college. It is possible to argue, however, that Chief Justice Burger's opinion requires proof of all of the characteristics before a constitutional disability will be imposed. If such an argument were to succeed, very few church-related colleges would have to be concerned about their constitutional eligibility.

d. *The* Tilton *Criteria*

A likely source of the criteria of sectarianism in future cases is the various characteristics of the defendant colleges discussed by Chief Justice Burger in his *Tilton* opinion. Briefly stated, those characteristics are as follows:

1. Persons other than Catholics were admitted to the student bodies and given faculty appointments.
2. Attendance at religious services was not required of students.
3. Religion courses were not limited to the Roman Catholic religion.
4. There was no effort by the colleges to proselytize religion.
5. The colleges adhered to established principles of academic freedom.

The Chief Justice's opinion does not purport to prescribe those factors as the only relevant criteria to be evaluated in determining a college's eligibility for public funds. However, it is quite unlikely that a lower court would declare ineligible any college possessing the same characteristics as the defendant colleges in the *Tilton* case.

4. *Choices Facing Church-Related Colleges*

The *Tilton* decision has put church-related colleges on notice that their religious functions and activities will be analyzed and evaluated in the future if they hope to participate in educational assistance programs. Some church-related colleges can pass this new constitutional test without altering any of their present policies and practices. Others may have to reconsider certain manifestations of their religious affiliations. Schools in the latter category must face the fact that government frequently exacts a price for the aid that it provides.

A number of church-related colleges undertook a similar process of self-evaluation five years ago, after the *Horace Mann* case was decided. However, that decision provided little objective guidance for such an undertaking. The Maryland Court of Appeals had considered more than twenty features of the defendant colleges' church relationships but had failed to assign independent significance to each of those features or to discuss their relative weights when considered in combination. As a result, a college could not know when it had become "too religious" and had crossed into the forbidden zone of sectarianism. Colleges that initiated changes in response to the *Horace Mann* decision tended to become as nonreligious as possible. In the process, many may have unnecessarily shed important aspects of their religious affiliations.

The *Tilton* decision does not provide precise guidance to church-related colleges. However, because Chief Justice Burger discusses far fewer characteristics of church-related colleges than did the Maryland Court of Appeals, the variables in the Supreme Court's equation of sectarianism appear to be fewer. That fact should permit greater predictability. There is another important difference between the *Tilton* and *Horace Mann* decisions. Running throughout the *Horace Mann* opinion is an undercurrent of hostility to religion. The Maryland Court of Appeals seemed to believe that the mixture of religion and education in a college was in itself an evil. No such attitude of hostility is manifested in Chief Justice Burger's opinion. The defendant colleges in the *Tilton* case freely admitted their church relationships, and the Chief Justice observed that they performed "admittedly religious functions." Despite those facts, the defendant colleges were found to be fully qualified to receive federal funds.

Many church-related colleges will now begin to feel understandable pressure to alter their church relationships to assure their continued eligibility for public funds. Hasty reaction to those pressures could be premature. Some of the changes that resulted could simply prove to be unnecessary. Other changes may so fundamentally alter the college's basic commitments that, upon careful reflection, the college may realize that the price exacted for public aid is too high. These observations may seem too obvious to state. However, they were not always obvious to those colleges that acted hastily in response to the *Horace Mann* decision.

Drawing upon the criteria of sectariarnism discussed above and the experiences of the defendant colleges in the *Tilton* case, it is possible to offer some suggestions to church-related colleges

which decide to re-evaluate their religious affiliations. These suggestions are offered with one cautionary note: A lawyer can explain the price that *might* have to be paid for public aid. Only a court with the power of final judgment can determine what price *must* be paid. And only the college itself can determine whether the potential or actual price is too high.

a. *Written Documents*

Written documents produced by church-related colleges — such as catalogs, fund-raising brochures, student and faculty handbooks, application forms, etc. — can become potent weapons in the hands of those challenging the college's eligibility for public funds. The plaintiffs in the *Tilton* case relied almost exclusively on the written documents of the defendant colleges to present their evidence at trial. In the plaintiffs' view, those documents were certain and predictable in their content, unlike the oral testimony of the individuals who worked and studied at the colleges. The plaintiffs also found many of those documents to be a fruitful source of possible proof of sectarianism.

Because they have been admonished to avoid "excessive entanglements," officials administering aid programs will also be likely to prefer an examination of a college's written documents to other forms of inspection. Justice Brennan's separate opinion in the *Tilton* and *Lemon* cases warned of the danger of "state inspectors prowling the halls of parochial schools and auditing classroom instruction." Government administrators surely will not want to be accused of engaging in such activities. Inspection of a college's written documents is a lesser form of surveillance and thus presents a lesser threat of prohibited entanglement.

Documents which do not accurately portray a college's purposes and program can present needless difficulties. Not everything that a college writes about itself gives a realistic picture of the school. Entire sections of catalogs remain unchanged from year to year even though the college is undergoing continual change. Information is sought on application forms that serves no useful purpose. Occasionally, because of the audience the college is trying to reach, it will engage in verbal overstatement and thereby distort the image that its program projects. An attorney for the plaintiffs in the *Tilton* case stated the problem somewhat ungraciously during the deposition of the present of one of the defendant colleges. After confronting the president with a document that appeared to contradict her oral testimony, he suggested that the document might be just a "sop" to parents.

Reflecting on the problems posed by written documents after the Supreme Court's decision in the *Tilton* case, the president of one of the defendant colleges observed: "The difficulty is that we [meaning church-related colleges] tend to express ourselves in a theological language when we write about ourselves." That theological language is easily misunderstood and difficult to explain in a courtroom. Quite often a college can be placed in the embarrassing position of telling a court or a government administrator that it really did not mean what it said in a particular document.

The starting point for any college concerned about its constitutional eligibility for public funds is a thorough review of its written publications and documents. Among the questions that might be asked about those documents are the following: Does the statement of purpose in the catalog and other publications accurately reflect the college's objectives or is it distorted by unnecessary religious references? Do application forms ask the applicant's religious preference and, if so, are those questions necessary? Are the descriptions of courses in religion current and do they accurately portray the content of those courses? Do any documents appear to impose religious restrictions on academic freedom and, if so, are those restrictions enforced or necessary? Are the descriptions of religious activities on the campus current and accurate?

The college need not and should not delete religious references that are accurate and important. By the same token, it should seriously reconsider all such religious references that are no longer relevant or necessary.

b. *Governance*

The emphasis in the *Horace Mann* decision on the religious influences and controls present in a college's governing board prompted a number of church-related colleges to consider and implement changes in their governing board. Such changes may have been unnecessary. Chief Justice Burger ruled in the *Tilton* case that the defendant colleges were eligible for public funds even though he found that "[a]ll four schools are governed by Catholic religious organizations." That observation is not necessarily accurate. All four schools were incorporated separately from their sponsoring religious groups. Under applicable principles of law, the colleges are separate corporate entities and are governed solely by the men and women who constitute their boards of trustees.

Nevertheless, the Chief Justice's statement demonstrates that a church-related college can qualify for public funds even if it is governed

by a religious organization. That principle was actually established by the Supreme Court more than seventy years ago in the case of *Bradfield* v. *Roberts*, which upheld a federal grant to a Catholic hospital which was operated by a "monastic order or sisterhood of the Roman Catholic Church" and over which the order "exercises great and controlling influence." Chief Justice Burger's opinion in the *Tilton* case appears to reaffirm that principle.

c. *Admissions and Hiring Policies*

Chief Justice Burger was not troubled that the faculties and student bodies of the four defendant colleges in the *Tilton* case were "predominantly Catholic." But he did stress that "non-Catholics were admitted as students and given faculty appointments." Thus, some religious diversity in the student body and the faculty is probably important.

What is clearly prohibited is exclusion of students and faculty members on strictly religious (and racial) grounds. The postscript to Justice White's concurring opinion in the *Tilton* case is unequivocal on that point, and Chief Justice Burger's opinion is not inconsistent with Justice White's position. In future cases, the fact that some students or faculty members profess a religious faith other than that of the sponsoring church may not be sufficient. The greater the number of students and faculty members adhering to the faith of the sponsoring church the greater the possibility that a court will infer an exclusionary policy. Questions concerning religious preference on student and faculty application forms tend to lend support to such an inference. A church-related college that does not practice religious (or racial) exclusion would do well to state its non-exclusionary policy in its catalog and other appropriate documents.

d. *Religious Worship*

Church-related colleges can continue to provide opportunities for religious worship on their campuses without jeopardizing their eligibility for public funds. What they probably cannot do is compel attendance at religious services.[21] Chief Justice Burger implied as much when he stated that "[n]ot one of these four institutions requires its students

[21]There is a certain incongruity in that limitation. The three service academies compel their cadets to attend religious services, and a federal district court has ruled that practice is not unconstitutional. However, that decision is now on appeal, and it is not certain that the district court's decision will survive appellate review. In addition, the reasoning employed by the district court is irrelevant to church-related colleges and universities.

to attend religious services." It is appropriate to emphasize at this point that no one of the several factors discussed by Chief Justice Burger was critically determinative. All of the factors were considered "cumulatively." Thus, compulsory chapel attendance, standing alone, may not be disqualifying. But requiring all students, irrespective of their religious beliefs or lack of them, to attend religious services would be difficult to justify. Conversely, a college that provided on a voluntary basis religious services for several denominations, and not just for students professing the faith of the sponsoring church, would improve its chances for being found eligible for public aid.

e. *Religious Instruction*

A church-related college's program of religious instruction is a potential source of great difficulty. Justice White would declare a college ineligible for public aid if it "required all students gaining entry to receive instruction in the tenets of a particular faith." The defendant colleges in the *Tilton* case "require their students to take theology courses," but they avoided censure because those courses were taught as academic disciplines and were not limited to the Roman Catholic religion. A college can offer as electives courses limited to the doctrines and tenets of the sponsoring church. But required courses cannot be so limited.

To some, requiring a student to take courses in religion suggests that the college is engaged in religious indoctrination. It is helpful, therefore, if the college has articulated a sound educational rationale for requiring such courses. For example, the defendant colleges in the *Tilton* case offered evidence that they viewed the study of religion as a separate and distinct academic discipline and, as such, an important and necessary part of any liberal arts education. For that reason, the defendant colleges believed it was as legitimate to require courses in religion as to require courses in English and the physical sciences.

f. *Academic Freedom*

Perhaps the most important of the criteria employed by Chief Justice Burger in evaluating the defendant colleges in the *Tilton* case was academic freedom. The Chief Justice found that "the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination." In theory, at least, proof that a church-related college fosters an atmosphere of academic freedom should negate any claim that it engages in religious indoctrination. Particularly when the college has on its faculty members of various religious faiths, the college's encouragement of academic freedom

would frustrate any efforts to proselytize the doctrines and tenets of its sponsoring church.

Chief Justice Burger seemed to accept that fact, for he twice emphasized that the four defendant colleges subscribed to the 1940 Statement of Principles on Academic Freedom and Tenure adopted by the American Association of University Professors and the Association of American Colleges. The plaintiffs had placed in evidence several documents tending to show that some of the defendant colleges imposed religious restrictions on what could be taught in the classroom. The colleges, however, presented testimony that those religious restrictions had never been implemented or imposed. As a consequence, the Chief Justice was satisfied that "these restrictions were not in fact enforced" and that "nothing in this record shows that these principles [of academic freedom] are not in fact followed."

The conflict between the documents and the actual policies of the defendant colleges on the issue of academic freedom is a stark illustration of the difficulties that inapplicable written statements can cause. Another court or another judge might have given greater credibility to the written statements than to the oral testimony relating to academic freedom policies.

The emphasis on academic freedom in Chief Justice Burger's opinion suggests that factor will loom large in future higher education litigation. The 1940 Statement of Principles allows for religious limitations on academic freedom if they are "clearly stated in writing," and some church-related colleges do purport to impose such limitations. Chief Justice Burger's emphasis on the fact that the defendant colleges did not enforce any such religious limitation would indicate that enforcement of those limitations will cause difficulties for church-related colleges seeking to establish their eligibility for public funds. Colleges which have adopted such limitations should now re-evaluate them and determine whether they serve any viable function in the college's operations.

g. *Statutory Restrictions*

The invalidation of section 754 (b) (2) of the Higher Education Facilities Act in the *Tilton* decision makes clear that government cannot make non-conditioned grants of public funds to church-related colleges. Without running afoul of the no-entanglement prohibition, the government must seek to ensure that public funds do not support a church-related college's religious functions or activities. It can be expected that future educational assistance programs will contain restrictions similar to those contained in the Higher Education

Facilities Act, which prohibited the use of funded facilities for religious instruction or worship. To avoid jeopardizing the constitutionality of such aid programs, church-related colleges should scrupulously observe those restrictions.

Failure to comply with statutory restrictions can produce a number of problems. If it could be shown that one or more church-related colleges ignored such restrictions, a court might conclude that such colleges cannot be trusted to observe constitutional limitations, just as the Supreme Court seemed to imply that parochial school teachers receiving salary supplements could not be counted on to teach only secular matter. Or a court might conclude that such colleges cannot successfully separate their secular and religious functions. Or a court might find that surveillance on a scale involving prohibited entanglement will be necessary to assure compliance. In any of those circumstances, a court would be justified in striking down aid to church-related colleges.

Failure to comply with statutory restrictions typically occurs through inadvertence. The college is simply not aware of the full range of restrictions imposed on its use of public funds. For example, in the *Tilton* case the federal government cited two instances in which church-related colleges were discovered to be making improper religious uses of Title I facilities. When those improper uses were called to the attention of the colleges, they were voluntarily terminated. There was no suggestion that the colleges were seeking deliberately to evade the requirements of the statute. To avoid inadvertent non-compliance, church-related colleges should consult with their attorneys and ask for an explanation of the full range of restrictions imposed by any statutes under which they are receiving assistance.

h. *State Constitutional Restrictions*

The *Tilton* decision construed only the Establishment Clause of the First Amendment and the limitations it imposes on aid to church-related colleges. When federal legislation is at issue, that is the only relevant constitutional provision. Many states, however, have enacted or are considering aid programs that benefit church-related colleges. Such legislation must stay within the bounds marked out by the federal constitution *and* the state constitution. A number of state constitutions have provisions related to aid to church-related education which are more specific in their language, and possibly more restrictive in the limitations they impose, than the Establishment Clause.

For example, the New York Constitution contains the so-called Blaine Amendment which provides that no public money, property or credit may be used directly or indirectly to aid or maintain "any school or institution of learning wholly or in part under the control or direction of any religious denomination or in which any denominational doctrine or tenet is taught."[22] The *Tilton* decision is not controlling in determining whether church-related colleges in New York qualify for state aid under that constitutional provision.

In any re-evaluation that is undertaken in light of the *Tilton* decision, a church-related college should seek advice from its attorneys concerning any additional restrictions that might be imposed by the state constitution.

V
CONCLUSION

The *Tilton* decision contains its disappointments. Chief among them are the narrowness of the victory won by church-related education and the emergence of a constitutional test that requires each church-related college to justify its eligibility for public aid. But the disappointments should not obscure the fact that the *Tilton* decision represents an important victory for the principle of direct public aid to church-related colleges. The decisiveness of the defeat suffered by church-related elementary and secondary schools in *Lemon* underscores the significance of the *Tilton* victory.

Perhaps the most refreshing aspect of the *Tilton* decision was the willingness of a majority of the Supreme Court to base its decision on the realities and dynamics of church-related higher education. Chief Justice Burger emphatically rejected the stale stereotypes contained in the appellants' "composite profile" as the factual premise for the decision. Rather, he focused on the actual practices and policies of the defendant colleges as reflected in the trial evidence. That evidence revealed that the defendant colleges were legitimate educational institutions which added a religious dimension to the education they offered. Thus, the Chief Justice concluded that those schools were "institutions with admittedly religious functions but whose predominant education mission is to provide their students with a secular education."

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[22]N.Y. Const., Art. XI, § 3.

Before the *Tilton* case was argued and decided, one writer suggested that the critical inquiry to be made in cases challenging aid to church-related education is "whether the educational function [of a church-related school] is distorted because of the institution's religious commitment."[23] The Supreme Court now appears to have adopted that approach to the problem. Church-related colleges and universities should be able to confront future constitutional challenges with confidence if the courts continue to adhere to that approach.

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[23]D. Giannela, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 588 (1968)